Nos. 15-233 & 15-255

IN THE

Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,
ALEJANDRO GARCÍA PADILLA, et al.
Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al.,
Respondents.

MELBA ACOSTA-FEBO, AS GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO AGENTS, et al.
Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF PUERTO RICO MANUFACTURERS ASSOCIATION, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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MOTION OF THE PUERTO RICO MANUFACTURERS ASSOCIATION, FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Puerto Rico Manufacturers Association (PRMA) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief. Counsel for respondents have also consented to the *amici's* filing of this brief. *Amici* are Puerto Rico's largest, and one of the oldest trade associations in our Commonwealth, founded in 1928. The PRMA is comprised of approximately 1,200 companies and represents the Puerto Rican manufacturing sector, suppliers and service providers, which together employ almost 350,000 US citizens on the island. Manufacturing alone represents 50% of Puerto Rico's GDP or $51 billion, pays the highest average wages, generates 3 indirect jobs for every direct job, and generates over one-half of the Commonwealth's current tax base.

The *amici* agree with Petitioners that Section 9 of the Bankruptcy Code does not preempt the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71, of June 28, 2014 (the "Recovery Act"). The *amici* will not repeat the main arguments presented by Petitioners, but fully support the main statement included in their petition. The *amici*'s brief addresses the harm that will befall the manufacturing sector in Puerto Rico, and consequently, the [number of jobs] that depends on manufacturing, if the decision below is allowed to stand.

The *amici* believe that the arguments set forth in their brief will assist the Court in resolving the issues presented by the petition.

For the foregoing reasons, the *amici* respectfully request that they be allowed to participate in this case.

Respectfully submitted,

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QUESTION PRESENTED

Whether Chapter 9 of the federal Bankruptcy Code, which does not apply to Puerto Rico, nonetheless preempts a Puerto Rico statute creating a mechanism for the Commonwealth's public utilities to restructure their debts.

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BRIEF OF THE PUERTO RICO MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The *amici curiae* in this case represents approximately 1,200 companies that comprise the Puerto Rican manufacturing sector, suppliers and service providers[1], which together employ almost 350,000 US citizens on the island. The Puerto Rico Manufacturers Association is a private, voluntary, non-profit organization established in 1928 to serve as the voice of Manufacturing in the Commonwealth of Puerto Rico, home to more than 3.5 million U.S. Citizens.

Manufacturing alone represents almost 50% of Puerto Rico's GDP or $51 billion. This sector pays the highest average wages, generates approximately 3 indirect jobs for every direct job, and generates over one-half of the Commonwealth's current tax base.

For decades, manufacturers have been incentivized to base their operations in Puerto Rico mainly by the low cost of a highly capable workforce and a favorable tax structure. An important example of the Commonwealth's appeal to the manufacturing sector is the strong presence over the years of

[1] Pursuant to Supreme Court Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. 5 days before the due date of this brief, the amici provided counsel for Petitioners and Respondents notice of intent to file this brief.

US pharmaceutical companies. In short, the manufacturing sector has been powering Puerto Rico's economy for decades.

Notwithstanding, this scenario has dramatically changed by the erosion of favorable tax laws which has resulted in a decline of manufacturing jobs in Puerto Rico from 155,000 to 73,200, with an average decline of 1.7% every year[2]. This is a tendency that we would certainly like to avoid. The Commonwealth's ability to restructure the debt of its public utilities pursuant to the Recovery Act would help curb unemployment rates which in turn will decrease the number of US families living under the poverty threshold, and the continued exodus to the mainland. It would also help avoid the collapse of our economy.

STATEMENT OF THE CASE

Puerto Rico has been in a legal limbo, without a legal framework that will allow public utilities to restructure their debt. To prevent the government of Puerto Rico from exercising its police power and address the absence of a legal framework to restructure public debt, is an unreasonable burden that will have devastating repercussions in our economy.

The Puerto Rico Recovery Act (hereinafter PRRA) was enacted by the Commonwealth as a solution to the oblivion into which the government of Puerto Rico had fallen in federal bankruptcy legislation.

To state that the Recovery Act is preempted by §903(1) of the Bankruptcy Code[3] is unreasonable and

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[2] *Puerto Rico: Economic Growth, Challenges, and Recent Economic Performance*, Estudios Técnicos Inc. January 22, 2016.

[3] 11 U.S.C. Ch. 9.

will have the devastating effect of denying a legal framework to restructure the debts of its public utilities and municipalities. Entities which are the sole providers of the basic necessities –such as water, electricity, road services and solid waste disposal-- of the people of Puerto Rico.

ARGUMENT

I. THE ABILITY TO RESTRUCTURE THE PUBLIC DEBT IS AN URGENT MATTER FOR THE MANUFACTURING SECTOR.

The future of Puerto Rico and its 3.56 million U.S. Citizens is dependent on the health and vitality of the local private sector. No jurisdiction is more dependent on manufacturing. It represents almost 50% or the Commonwealth's GDP. The private sector and its employees comprise the primary tax base for the local government. We have continuously emphasized that the manufacturing sector alone currently generates almost 350,000 direct and indirect jobs; this represents more than one in every 12 jobs in the island. The manufacturing sector pays the highest wages with an average of $39,000 a year[4].

Puerto Rico's lack of access to a legal framework which allows a fair restructuring of its public debt threatens the manufacturing sector in many ways. If a viable and reasonable solution is not promptly offered or implemented, the Commonwealth government will be forced to suspend immediately basic services to its constituents. In fact payments to the bond holders will not be satisfied. To deny Puerto Rico

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[4] May 2014 State Occupational Employment and Wage Estimates Puerto Rico, http://www.bls.gov/oes/current/oes_pr.htm#00-0000.

of its power to enact legislation that is not preempted by law in order to deal with its debt, results in a direct attack against the US citizens living on the island.

A. The Economic Situation in Puerto Rico

Puerto Rico is reeling with a staggering public debt that has increased from $24.2 billion in 2000, to $72.2 billion in 2015[5]. That has left our economy in a perpetual recession. Adding insult to the injury, the lower courts held that the Commonwealth is unable to reorganize the overwhelming debt of its public utilities in bankruptcy by virtue of an alleged preemption by a law that simply excluded Puerto Rico from its application and said nothing about the Commonwealth's ability to enact a law to establish its own restructuring regime.

The United States' presence in Puerto Rico dates back to 1898. In 1917 Puerto Ricans were granted US citizenship. Our island is about the size of Connecticut and has more than 3.5 million residents, which represent a bigger population than approximately 20 of the States. This number of residents has been rapidly declining due to high unemployment rates. The manufacturing sector has also been shrinking since 2006.

Despite the government's efforts to promote economic development, fiscal year 2014 registered a contraction in real GNP growth of -0.9%, following

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[5] Government Development Bank – See also, Puerto Rico: Economic Growth, Challenges, and Recent Economic Performance, Estudios Técnicos Inc., January 22, 2016, page 9.

another contraction in 2013 of -0.2% from a preliminary positive growth of 0.3%[6].

B. The Manufacturing Sector in Puerto Rico

Historically, Federal Tax Policy was the predominant factor in creating Puerto Rico's strong manufacturing job base which today represents the biggest source of the Island's tax revenue. Section 936 of the Internal Revenue Code (hereinafter "IRC") had a positive and direct effect on Puerto Rico's economy. This positive impact was recognized in 1989 by the General Accounting Office (hereinafter GAO) which noted that 13 years after enactment of Section 936, manufacturing firms in Puerto Rico employed 105,500 individuals directly comprising 11% of the total employment of 952,000[7]. By 1997, that number stood at 155,000 Americans directly employed by the Puerto Rico manufacturing sector. However, the repeal of Section 936 in 1996 produced a steady and rapid decline of manufacturing investment and therefore, jobs in the manufacturing sector in Puerto Rico. Today, the number of U.S. citizens employed directly by manufacturing has been reduced to approximately 73,000[8]. It's fair to say that this drastic reduction is mostly due to the elimination of Section 936 more than any other factor.

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[6] Id. Puerto Rico: Economic Growth, Challenges, and Recent Economic Performance, Estudios Técnicos Inc., January 22, 2016, page 4.

[7] Report to the Chairman, Committee on Finance, US Senate, June 1993, Tax Policy and the Section 936 Tax Credit, http://www.gao.gov/assets/220/218131.pdf

[8] Id.

For many years, Puerto Rico was heralded as a hub for foreign investment in areas such as bioscience and technology. Multinational manufacturers have historically developed amicable relationships with the government of Puerto Rico in order to further the economic development of the Island. Most of the large manufacturers in Puerto Rico are United States headquartered multinationals.

According to the Caribbean Business' Book of Lists, the largest U.S. Public Companies in Puerto Rico include United States headquartered companies (with full-time employees in Puerto Rico) such as:

Wal-Mart Stores Inc. (15,000); Walgreen Co. (4,761); Medtronic (3,200); General Electric Co. (2,337); Baxter International Inc. (2,253); Amgen (2,000); Eaton (1,800); Pfizer (1,711); Eli Lilly & Co. (1,600); St. Jude Medical Inc. (1,313) Covidien (1,260); Stryker corp. (1,240); AbbVie Inc. (1,064); Hewlett-Packard Development Co. LP (1,000) At&t (975*); Costco Wholesale Corp. (680); Zimmer Holdings Inc. (651); Liberty Global Inc. (645); Direct TV (600*); Boston Scientific (587); Humana Inc. (586); Hubbell Inc. (575); Cardinal Health Inc. (561); Patheon Inc. (530); Merck & Co. (400) . Caribbean Business; The Book of Lists, Page 67 (2015). *Caribbean Business estimates.

Manufacturing companies paid $1.4 billion in income taxes in 2009 or 57.9% of all corporate income tax collections. In addition, taxes collected on sales by multinational firms in Puerto Rico to their affiliates off-island amounted to 21% of total General Fund income. Manufacturing offers better wages for U.S. Citizens in Puerto Rico.

But the ultimate beneficiaries of the presence of the manufacturing sector in Puerto Rico are US Citizens in Puerto Rico.

While approximately 42% of our population lives below the "poverty line", and the current unemployment rate is at 14%, workers in the manufacturing sector earn an average wage of $39,000 which is 30% higher than the per capita average. In an economy in which almost 40% of the workers earn the minimum wage, manufacturing wages are a major factor in improving the standard of living for all of Puerto Rico's residents.

C. The Importance of Puerto Rico's Manufacturing Sector to the United States and the Global Market

The core of Puerto Rico manufacturing sector is the Pharmaceutical and Medical Devices companies based in the Island. . For over 50 years, Puerto Rico has been home to more than 70 FDA-approved pharmaceutical plants and over 50 medical device manufacturing plants[9].

According to the Puerto Rico Industrial Development Company, Puerto Rico is home to top multinational pharmaceutical companies, including Astra Zeneca, Abbott-Abbvie, Bristol-Meyers Squibb, Merck, Pfizer, Eli Lilly and numerous others. Many of these companies operate more than one site on the Island and are responsible for the manufacturing of about 20% of the world's insulin. As of 2014, Puerto

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[9] Richards, Kevin C., Puerto Rico's Pharmaceutical Industry: 40 Years Young, September 20, 2006.

Rico based pharmaceutical plants produced 13 of the top 20 bestselling drugs on the U.S. mainland[10].

Also, the he Pharmaceutical Industry Association averages the industry's salaries at $62,000 and has identified 14 biopharmaceutical companies as responsible for over 33% of the total tax dollar returns.

Unquestionably, Puerto Rico is currently the world's third largest biotech manufacturer[11] with more than two million square feet of dedicated plant space and is the seventh largest medical device producer with more than 50 plants located on the island.

D. The Role of Public Utilities

Puerto Rico's public utilities provide essential services and are primarily responsible for a large part of the overall debt. Public utilities in the Island provide basic services, such as water, electricity and roads. They currently have an accumulated debt of over $20 billion. The affordable and reliable services provided by the utilities is particularly important to the manufacturing sector because operations are dependent on these services.

Because of Puerto Rico's condition as an island, the Commonwealth is highly dependent on imports of raw materials, food and oil which increases costs of manufacturing and business operations. The principal source of energy is generated using imported

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[10] Karl Schmieder. "Will New Legislation Shatter The Pharma Industry's Tropical Dreams?", Life Science Leader, December 2010.

[11] The pharmaceutical industry: an overview of CPI, PPI, and IPP methodology by the Bureau of Labor Statistics of the US Department of Labor, available at http://www.bls.gov/ppi/pharmpricescomparison.pdf

oil resulting in higher energy costs. A comparison with the State of Florida found that energy costs in Puerto Rico are three times that of Florida's; on average 20 cents per kilowatt-hour in Puerto Rico versus 12 cents in Florida. The average for the United States is 11 cents per kilowatt-hour[12].

As a result of the debt and economic strain, Puerto Rico's public utilities are facing limited access to capital markets and high interest rates that have a detrimental impact in their liquidity. Contrary to this scenario, inn public utilities corporations in the United States are granted the benefit of a legal framework that would allow them to restructure their debt \fairly and for the benefit of all the US citizens living in the Mainland. However, US Citizen living in Puerto Rico are not provided the same bankruptcy protections that are accessible to municipalities in the United States.

E. The Effect of Utilities in the Manufacturing Sector

High energy prices have a detrimental impact on the manufacturing sector. The World Economic Forum (WEF) has listed high energy cost and non-competitive electrical infrastructure as a significant challenge to the Island's economy and as a weakness in the WEF's Global Competitiveness Report for the last five years[13].

Numerous initiatives, petitions and recommendations have been publicly discussed regarding the need

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[12] U.S. Energy Information Administration, State Profile and Energy Estimates, Available http://www.eia.gov/

[13] The Global Competitiveness Report, World Economy Forum, Puerto Rico, Country/Economy Profile http://www3.weforum.org/docs/GCR2014-15/PRI.pdf

to improve Puerto Rico's energy system and provide affordable electricity to consumers[14]. Constructive steps have been discussed in order to ensure that Puerto Rico is able to remain a competitive jurisdiction in the global market place. This inevitably requires utility costs to become a minor component of the equation for doing business.

In the particular case of Puerto Rico's energy prices, this cost plays a major role in the daily management of any operation. Whether you are operating a manufacturing plant or administrating a small business, the end result is an inevitable increase in the cost of living and the cost of doing business.

As an example of how high utility costs impact the operating dynamics, a manufacturing plant that is faced with an increase in energy costs must take certain steps to manage such increases. Its general manager will be forced to explain the financial variances in the operating costs, identify the reasons behind said variances and Implement ways to compensate the cost increase, such as:

- Cutting jobs;
- Pausing any improvement projects or plan expenses;
- Hesitating on capital investment geared towards new products;
- Re-directing capacity or capability improvements in order to implement energy

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[14] The U.S. House Energy & Mineral Resources Subcommittee, chaired by Rep. Doug Lamborn (R.,Co.), held an oversight hearing on January 12, 2016 on the energy challenges and opportunities facing Puerto Rico.

cost reduction projects, among other tough decisions.

Increases in utility costs place the manufacturing plant's future in Puerto Rico at a high risk. For example, companies refrain from bringing new products to our local plants. Employees at all levels become very aware of these challenges and this contributes to a suboptimal working environment. We cannot identify a single instance where utility cost increases will have a positive impact in Puerto Rico's manufacturing sector and the ripple effect will definitely harm the US citizens of Puerto Rico.

Despite all of the challenges faced by the manufacturing sector, our GDP figures demonstrate that we continue to be successful in our operations in Puerto Rico[15]. If the government is unable to restructure the utilities' debt, an increase in costs for doing business in Puerto Rico is practically a guarantee. This will precipitate a chain of events that will adversely impact the economy. Any increases in utility costs or any failure in the reliability of their services will destroy the manufacturing industry in Puerto Rico. Local businesses and manufacturing plants will be faced with the prospect of cutting jobs or increasing prices to compensate. The net effect will be that local consumers will face higher costs everywhere, while global customers will look for cheaper options and there will be less demand for our local product.

Also, utilities such as water, sewage, and road services face an immediate uncertainty that is damaging to the investment decisions of U.S.

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[15] Puerto Rico: Economic Growth, Challenges, and Recent Economic Performance, Estudios Técnicos Inc., January 22, 2016.

multinationals operating in Puerto Rico. In an already unstable environment, it is unlikely that the competitiveness of our economy will recover in a very long time.

F. Fair treatment of Puerto Rico

Puerto Rico has experienced ten straight years of negative economic growth. Recent data suggests that the unemployment rate is 14 percent. Continuing the decline that began in 2002, Census Bureau data show that Puerto Rico's population fell by 36,000, or about 1 percent, between July 2012 and July 2013[16].

II. RESTRUCTURING THE PUBLIC DEBT WILL BENEFIT THE MANUFACTURING SECTOR AND, AS A DIRECT AND INDIRECT RESULT, THE PEOPLE OF PUERTO RICO.

A. The Analysis of Preemption

In an attempt to exercise the same rights that States have and that the Federal Bankruptcy Code did not prohibit, the Commonwealth enacted the Recovery Act to establish a fair and structured legal framework that will allow public utilities to restructure their debt.

Respondents argue that the Bankruptcy Clause of the Federal Constitution and the Federal Bankruptcy Code preempt the field for territories to enact restructuring laws. However, we agree with Petitioners position that Chapter 9 of the Federal Bankruptcy Court does not preempt Puerto Rico's

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[16] Census Bureau's Population Estimates Program, US Census Bureau, available at http://www.census.gov/popest/data/puerto_rico/totals/2015/index.html

Recovery Act simply because of the exclusion of territories from the scope of the federal law.

All fifty States have the authority to allow their municipalities or public utilities to benefit from the protections offered by Chapter 9 of the Federal Bankruptcy Code. See 11 U.S.C. §109(C). However, Puerto Rico is excluded from the applicability of Chapter 9, where Congress defined the term "state" to include Puerto Rico with the exception of the definition of who may be a debtor under said Chapter 9. See 11 U.S.C. §101(52). Unlike the states under federal bankruptcy protection, Puerto Rico cannot authorize its municipalities or, in this case, its public utilities, to seek Chapter 9 relief.

Congress's legislative powers are mainly enumerated in Article I, Section 8 of the US Constitution[17]. But what happens when the federal statute expressly establishes that a statute, or a part thereof, is not applicable to a specific jurisdiction? There is no ambiguity where the federal Bankruptcy Code is clear in establishing that Chapter 9 is not available to the Commonwealth. "When interpreting a statute, we look first and foremost to its text." See *U.S. v. Alvarez*, 511 U.S. 350, 356 (1994). In a case where there's a question of statutory interpretation, the analysis must begin with what the statute actually says and not what is assumed because of its mere existence.

Congressional action in any particular subject is to be defined by congressional intention. When a statute expressly preempts any other law, the congressional intention is evident. In situations where congressional intention is not expressly stated, but rather inferred

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[17] U.S. Const. Art. I, § 8

from a statute, this inferred intention must be overwhelmingly clear. In the absence of specific pre-emptive language, any implied intent to surpass state legislation must birth from a federal regulatory scheme "so pervasive as to make reasonable the inference that Congress left no form for the States to supplement it". See *Pacific Gas Electric Co. v. State Energy Resources Conservation Development Commission*, 461 U.S. 190, 103 S. Ct. 1713, 75 L.Ed.2d 752 (1983). The ubiquitous nature of federal bankruptcy law is unquestionable and even where it is applicable in the States it coexists with state laws that regulate the relationship between parties.

B. Silence of the Bankruptcy Code as Punishment

The amendment of the Bankruptcy Code that rendered Puerto Rico ineligible to authorize its municipalities to restructure their debt under Chapter 9, should not be construed to prohibit the Commonwealth from enacting legislation for that purpose. There is silence with respect to Congress' intent regarding a prohibition to Puerto Rico from enacting a local regime for the restructuring of its utilities debt. Congress' silence cannot be regarded as a form of automatic intent to prevent Puerto Rico from enacting state law in an area that was not expressly occupied. As cited by Petitioners, this Court does not readily impute to Congress the presumable, yet never expressed, intent to preempt state law in any subject matter that Congress has not occupied.

This Honorable Court interpreted federal labor laws to preempt state trespass laws where said interpretation would create another kind of juridical limbo where neither the federal nor the local law would apply.

An implied preemption should not become an excuse to permit an unfair and differential treatment to US citizens living in Puerto Rico. A fair and impartial treatment requires an interpretation that the term "State", as defined by the Bankruptcy Code, left Puerto Rico outside of Chapter 9 but did not intend to establish that no other debt restructuring process could be set in place. Silence cannot be interpreted as some sort of territorial punishment that would perpetually inhibit the Commonwealth from establishing a legal framework where Congress simply left us out. If Congress had indeed intended to establish the unreasonable and unfair position of leaving Puerto Rico out of the applicability of Chapter 9's protection, as well as a ban to local legislators to fill that gap, then it could have clearly established such prohibition. In the absence of clear and manifest intent by Congress, is mandatory presumption that Congress did not displace local law.

Just as the rest of Puerto Rico's residents, the manufacturing sector lacks alternative measures to face additional increases in operational costs. Absent ways to restructure their debt, public utilities are confronted with an uncertain path that will probably leave them without money to operate. This makes addressing Puerto Rico's fiscal challenges an even greater threat to the island's economic future.

Providing a transparent and structured process for debt reorganization that is fair to all parties involved, would render options for the Commonwealth to finally address high unemployment and the extended economic malaise that Puerto Rico has arduously worked to revert.

CONCLUSION

Puerto Rico is currently facing an intense fiscal crisis which has increased already escalating high costs of doing business, has led to higher unemployment rates and to a rapid exodus of our residents to the mainland. Puerto Rico has the highest energy costs in the U.S. today; that is, two to three times the rates paid elsewhere in the nation. Our health care system is under great stress. The local manufacturing sector, despite still being the major economic force in our Island, has been consistently shrinking over the last decade.

The manufacturing sector and its related services are highly dependent on a public utility regime that is reliable and affordable in order for multinationals and local companies to continue doing business in Puerto Rico. We have repeatedly stressed that operating costs in the Island are high and if they continue to rise, due to the inability to pay or restructure their debt, the competitiveness of Puerto Rico will be undermined, thus affecting millions of American Citizens.

The contention that the absence of language in a federal statute automatically barred Puerto Rico from enacting its own laws to address such a critical issue for the Puerto Rican people is incorrect as a matter of law. Moreover, to claim that millions of American citizens living on the island shall continue to lose their jobs, face high energy and water costs and forced to migrate outside of their homeland at the expense of preventing public utilities from being capable of reorganizing their debt in an orderly fashion constitutes an attack to basic principles of morality and human justice.

The PRMA agrees that there is no preemption where there is no express prohibition, nor where there is no federal regulatory framework that addresses this matter. The Commonwealths manufacturing sector is in respiratory distress and only a recognition of this Court of Puerto Rico's right to establish said framework, thus exercising its police powers, will breathe life into a rapid falling of the Commonwealth's economy principal source of growth.

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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